(3)

No. 03-677

IN THE

Supreme Court of the United States

GLENN A. HAWKINS, NEDRA J. HAWKINS, MARTIN F. RADMER, GERALD W. BREDENBERG, JOANNE JUST, CHRISTOPHER E. SCHROEDER, AND CHARLES SATTLER,

Petitioners,

v.

AID ASSOCIATION FOR LUTHERANS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent Aid Association for Lutherans has no parent corporation, and no publicly held company owns 10% or more of its stock.

On January 1, 2002, Lutheran Brotherhood merged into respondent Aid Association for Lutherans. The combined entity subsequently became known as Thrivent Financial for Lutherans, a fraternal benefit society organized under the laws of Wisconsin.

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INTRODUCTION

This is yet another case in which plaintiffs are trying to avoid arbitration by filing a lawsuit, and then litigating to the hilt over whether they are entitled to litigate in the first place. Petitioners here are members of respondent Aid Association for Lutherans ("AAL"), a fraternal benefit society that provides its members with life insurance and other benefits. Under the AAL bylaws, members are required to resolve "all claims, actions, disputes and grievances of any kind or nature whatsoever" with AAL through a series of procedures culminating in binding arbitration, and "[n]o lawsuits or other actions may be brought for any claims or disputes covered by this section." Notwithstanding this clear language, petitioners filed putative nationwide class actions against AAL challenging a variety of insurance sales practices. AAL promptly moved to compel arbitration pursuant to the dispute resolution process set forth in the bylaws, and the courts below correctly recognized that AAL was entitled to such relief. Petitioners, however, are determined to continue their four-year frolic and detour through the judicial system, in manifest derogation of their obligation to arbitrate. Enough is enough. Because the petition presents no issue remotely worthy of this Court's review, this Court should deny the petition.

COUNTERSTATEMENT OF THE CASE

A. Background

AAL is a fraternal benefit society chartered under Wisconsin law with its principal place of business in Appleton, Wisconsin. Pet. App. 2. As a fraternal benefit society, AAL is a non-profit, non-stock membership organization with a representative form of government that provides life insurance and other benefits to its members. *Id.* (citing Wis. Stat. § 614.01). Like other fraternal benefit societies, AAL is not generally regulated by the same laws as commercial insurance companies. Rather, every State (including Wisconsin) has a distinct statutory scheme

governing these organizations. *See id.* (citing Wis. Stat. §§ 614.01 *et seq.*; 632.93 *et seq*).

Under Wisconsin law (like the laws of other States), fraternal benefit societies are not only *authorized* but *required* to use "open" contracts—*i.e.*, contracts that incorporate the society's bylaws and any subsequent amendments thereto, so long as they do not diminish the "benefits" promised in the contract (or "certificate"). *See id.* (citing Wis. Stat. §§ 632.93(1)-(2)). Thus, AAL's bylaws provide that "[a]ny subsequent changes to the articles of incorporation or bylaws shall be binding upon the member, beneficiaries, or other persons affected, and shall govern and control in all respects, except that no changes shall destroy or diminish benefits promised in the certificate when it was issued." Bylaws § 4, Pet. App. 106, 122. And—reflecting these provisions—all of the AAL contracts at issue here specify that AAL's articles of incorporation and bylaws are part of the agreement, and explicitly state that any subsequent amendments to the bylaws are binding on the policyholder. *See* Pet. App. 2.

When petitioners became AAL members and purchased their policies, AAL's bylaws did not prescribe a means for resolving disputes between a member and the organization. *See id.* In March 1999, however, AAL's Board of Directors amended the bylaws to include a Member Dispute Resolution ("MDR") Program. Pet. App. 3. Under the amended bylaws, the MDR Program is "the sole means to present and resolve" any member dispute with AAL. Bylaws § 12(a), Pet. App. 126. The Program established a three-step process designed to resolve disputes outside of litigation. The first two steps of this process are non-binding appeal and mediation. Bylaws § 12(c), Pet. App. 126-27. If these initial non-binding steps do not provide a satisfactory resolution, the bylaws provide that "the matter will be resolved by binding arbitration in accord with rules of the American Arbitration Association." Bylaws § 12(c), Pet. App. 127. The decision of the arbitrator(s) is final and binding on both the claimant and AAL. *See id.* AAL pays the costs of

mediation and/or arbitration, except for the claimant's "attorney's fees, experts' fees, or discovery costs." Bylaws § 12(d), Pet. App. 127. And, just so that there is no ambiguity, the amended bylaws specify that "[n]o lawsuits or any other actions may be brought for any claims or disputes covered by this section." Bylaws § 12(c), Pet. App. 126.

B. The Missouri Lawsuit

In August 1999, petitioners Radmer, Bredenberg, Just, and Schroeder—all AAL members and insureds—filed a putative nationwide class action against AAL in state court in Missouri. The *Radmer* complaint alleged a variety of common-law claims in connection with AAL sales practices. AAL timely removed the action to the U.S. District Court for the Western District of Missouri on diversity grounds. In April 2000, however, that court remanded the action to state court on the ground that the statutory amount-in-controversy requirement of 28 U.S.C. § 1332 was not met. *See* Pet. App. 60-75.

In analyzing this issue, the Missouri court "treat[ed] th[e] putative class action as if it ha[d] been certified," Pet. App. 64 n.1, and held that federal jurisdiction would attach only if "*each* member of the class [could] individually establish the minimum jurisdictional amount." Pet. App. 64 (citing *Zahn v. International Paper Co.*, 414 U.S. 291, 294-95 (1973) (emphasis added)). While assuming that at least one named plaintiff had a claim worth more than $75,000, *see* Pet. App. 65 n.2, the court declined to exercise federal jurisdiction over the putative class action in light of *Zahn*. In particular, the court held that "the legislative history [of the supplemental jurisdiction statute, 28 U.S.C. § 1367] conclusively demonstrates that Congress did not intend to overrule *Zahn* and expand federal jurisdiction by abrogating the rule that each class member must satisfy the $75,000 requirement of § 1332." Pet. App. 72. "[B]ecause plaintiffs' claims may not be aggregated to satisfy § 1332 and because this court may not exercise supplemental jurisdiction pursuant to § 1367 over class

members who cannot meet the $75,000 amount in controversy requirement, this case will be remanded to the Circuit Court of Jackson County, Missouri." Pet. App. 74. Under settled law, AAL was precluded from appealing that ruling. *See* 28 U.S.C. § 1447(d); *In re Business Men's Assurance Co.*, 992 F.2d 181, 182 (8th Cir. 1993) (*per curiam*).

C. The Lawsuits At Issue Here

Section 4 of the Federal Arbitration Act authorizes an independent action to compel arbitration, wholly separate from an action allegedly filed in derogation of an arbitration agreement. *See* 9 U.S.C. § 4. In October 1999, while the *Radmer* action was pending in the U.S. District Court for the Western District of Missouri, AAL brought precisely such an action against the four *Radmer* plaintiffs in the U.S. District Court for the Eastern District of Wisconsin. Pet. App. 3.

Shortly thereafter, in November 1999, petitioner Sattler—an AAL member and insured—filed a putative nationwide class action against AAL in state court in Illinois. Pet. App. 4. Like the underlying *Radmer* complaint in Missouri, the *Sattler* complaint alleged a variety of common-law claims in connection with AAL's insurance certificates. AAL timely removed the action to the U.S. District Court for the Northern District of Illinois on diversity grounds, and AAL amended its petition to compel arbitration in the Eastern District of Wisconsin, adding Sattler as a respondent. The Illinois federal court (Nordberg, J.) subsequently transferred the underlying *Sattler* case to the Eastern District of Wisconsin under 28 U.S.C. § 1404(a). *Id.*

In July 2000, petitioners Glenn and Nedra Hawkins—both AAL members and insureds—filed a putative nationwide class action against AAL in state court in Indiana. *Id.* Like the underlying *Radmer* and *Sattler* complaints, the *Hawkins* complaint alleged a variety of common-law claims in connection with AAL's insurance certificates. AAL timely

removed the action to the U.S. District Court for the Northern District of Indiana on diversity grounds. The *Hawkins* plaintiffs moved to remand the case to state court, but the court (Sharp, J.) denied the motion and transferred the case to the Eastern District of Wisconsin under 28 U.S.C. § 1404(a). Pet. App. 57-58. AAL then moved to compel arbitration of the *Hawkins* claims, just like the *Radmer* and *Sattler* claims, following transfer.

Meanwhile, the *Radmer* plaintiffs moved to dismiss the petition to compel arbitration for lack of subject-matter jurisdiction, and, after the Missouri remand order in April 2000, on the ground that that order was entitled to preclusive effect. Pet. App. 76-87. The Wisconsin federal court (Gordon, J.), however, denied the motion, noting that there was indisputably diversity jurisdiction with respect to one of the *Radmer* plaintiffs (petitioner Schroeder), and that the supplemental jurisdiction statute authorized jurisdiction over the other three *Radmer* plaintiffs. Pet. App. 90 (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997)). The court also rejected the argument that it was bound by the earlier Missouri remand order, noting that "an unappealable remand order issued under § 1447, like the *Radmer* court's, has no preclusive effect." Pet. App. 91 (citing *Benson v. SI Handling Sys., Inc.*, 188 F.3d 780, 783 (7th Cir. 1999); *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 708-09 (7th Cir. 1999)).

Thereafter, in October 2001, the Wisconsin federal court (Clevert, J., upon reassignment) granted AAL's independent petition to compel arbitration of the *Radmer/Sattler* claims, and its motion to compel arbitration of the *Hawkins* claims. Pet. App. 14-36, 37-56. The court then dismissed both the underlying *Hawkins* and *Sattler* lawsuits without prejudice. The court ordered the parties to proceed no further in any other trial court pending the completion of arbitration, and, in

response, the Missouri state court stayed the underlying *Radmer* case (a stay that remains in effect).

Upon petitioners' appeal, the U.S. Court of Appeals for the Seventh Circuit affirmed. As a threshold matter, the court rejected the four *Radmer* petitioners' argument that the Wisconsin district court had erred by refusing to give preclusive effect to the earlier Missouri district court order remanding the underlying *Radmer* case to state court. As the Seventh Circuit explained, "[t]his remand ... was not entitled to preclusive effect because it was unappealable under 28 U.S.C. § 1447(d)." Pet. App. 6 (citing *Benson*, 188 F.3d at 783). The court also noted that the Wisconsin district court's ruling was consistent with Seventh Circuit precedent, "which holds that when one named plaintiff meets the minimum amount-in-controversy threshold, a district court may exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) over the remaining plaintiffs' claims, even if their individual claims do not exceed that amount." *Id.* (citing *Prescription Drugs*, 123 F.3d at 607).

Turning to the merits, the Seventh Circuit rejected petitioners' core contention—that the amendments to AAL's bylaws creating the MDR Program, including the requirement of binding arbitration, were fundamentally unfair—by emphasizing that fraternal benefit societies like AAL are not only *authorized* but *required* to use "open contracts." Pet. App. 7-8. Because petitioners had agreed to be bound by all subsequent amendments to the bylaws, "the fact that [they] were not consulted" when the arbitration provisions were adopted "is of no consequence." *Id.* at 8. The court further declined to consider petitioners' complaints about the unavailability of attorneys' fees and punitive damages in arbitration, noting that "complaints about the unavailability of such remedies first must be presented to the arbitrator." *Id.* at 9. "Because the adequacy of arbitration remedies has nothing to do with whether the parties agreed to arbitrate or if the claims are within the scope of that agreement," the court explained,

"these challenges must first be considered by the arbitrator." *Id.* And "[t]he same reasoning applies to [petitioners'] complaint that they are prohibited from proceeding in arbitration as a class." *Id.* at 10.

Petitioners did not seek rehearing either by the panel or the *en banc* court, but instead moved to stay issuance of the mandate. The Seventh Circuit denied that motion. Petitioners have now asked this Court to review the Seventh Circuit's judgment.

REASONS FOR DENYING THE WRIT

I. The Seventh Circuit Correctly Held That The Missouri Remand Order Is Not Entitled To Preclusive Effect.

Petitioners first argue that the Seventh Circuit erred, and deepened a circuit conflict, by declining to give preclusive effect to the Missouri federal court's remand order even though that order was concededly unappealable under 28 U.S.C. § 1447(d). *See* Pet. 9-18. They are wrong on both scores.[1]

Petitioners base their argument on *Johnson Steel Street-Rail Co. v. William Wharton, Jr. & Co.*, 152 U.S. 252, 261 (1894), a decision that petitioners themselves delicately characterize as "vintage." Pet. 17 n.2. *Johnson Steel*, according to petitioners, established a rule that "a judgment is not to be denied preclusive effect merely because it could not be appealed." *Id.* at 16. But far from establishing any such rule, this Court has emphasized that "[u]nder contemporary principles of collateral estoppel," the unappealable nature of a decision "strongly militates *against* giving [it] preclusive effect." *Standefer v.*

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[1] As a threshold matter, this argument does not even apply to all petitioners, but only to the four *Radmer* petitioners who were parties to the remanded Missouri lawsuit. With respect to the other three petitioners (Sattler and the Hawkinses), it is undisputed that the courts below properly exercised jurisdiction over the claims, and no relief on this ground is feasible. Certainly, the non-*Radmer* petitioners are not allowed to "piggy back" on the *Radmer* plaintiffs' jurisdictional arguments that have no application to their claims.

United States, 447 U.S. 10, 23 (1980) (emphasis added). For that proposition, the *Standefer* Court cited § 68.1 of Tentative Draft No. 3 of the Restatement (Second) of Judgments, which the American Law Institute has since formally adopted. That provision specifies that "relitigation of [an] issue in a subsequent action between the parties is not precluded [when] ... [t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action." *Restatement (Second) of Judgments* § 28(1), at 273 (1980). *Standefer* expressly limited *Johnson Steel* to the proposition that the availability of appellate review is not "*always* an essential predicate of estoppel." 447 U.S. at 23 n.18 (emphasis added).

The potential existence of an *exception* to the general rule set forth in the Restatement and endorsed by this Court in *Standefer*, however, does not negate the rule's existence. Thus, while petitioners seek to wrap themselves in the mantle of *stare decisis* by championing *Johnson Steel*, they actually seek to breach a solid wall of precedent (endorsed by the Restatement and *Standefer*) holding that a remand order unappealable by virtue of 28 U.S.C. § 1447(d) is not entitled to preclusive effect. *See, e.g., Medisys Health Network, Inc. v. Local 348-S United Food & Commercial Workers*, 337 F.3d 119, 124 (2d Cir. 2003) ("Under contemporary principles of collateral estoppel, the unavailability of appellate review of remand orders under § 1447(d) strongly militates against giving a judgment preclusive effect.") (internal quotations omitted); *Christopher v. Stanley-Bostitch, Inc.*, 240 F.3d 95, 100 n.5 (1st Cir.), *cert. denied*, 534 U.S. 820 (2001) (*per curiam*) (emphasizing, in the context of an unappealable remand order, that "[a]s a matter of federal law, unappealable decisions generally do not have preclusive weight"); *Benson v. SI Handling Sys., Inc.*, 188 F.3d 780, 783 (7th Cir. 1999) (Easterbrook, J.) ("[A] district judge's remand order lacks preclusive effect when § 1447(d) blocks appellate review."); *Health Cost Controls of Ill., Inc. v.*

Washington, 187 F.3d 703, 708 (7th Cir. 1999) (Posner, J.) ("An *unappealable* ruling ... is not *res judicata*," specifically including a remand order based on "lack of subject-matter jurisdiction" under § 1447) (emphasis in original).

Because petitioners cannot feasibly argue, in light of *Standefer*, that the decision below contradicts this Court's precedents, they are reduced to arguing that the issue presented "has not been settled by this Court," Pet. 14, and is the subject of a conflict between the decision below and *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 634 (5th Cir. 1974), *see* Pet. 11. The alleged conflict, however, is illusory. *Napper* predates *Standefer*, and is expressly based on *Johnson Steel*. *See Napper*, 500 F.2d at 636-37 (citing *Johnson Steel* for the proposition that "the inability to appeal from the order of remand does not permit the issue actually litigated and determined in the [first federal action] to be relitigated in the second action."). Because *Standefer* endorsed precisely the opposite rule, and essentially limited *Johnson Steel* to its facts, *Napper*'s broad statement is no longer good law in light of *Standefer*.

Indeed, the Fifth Circuit has since cut back on *Napper*, citing Section 28 of the *Restatement (Second) of Judgments* with approval and emphasizing that "the availability of review is of paramount importance to the issue of preclusion." *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 395 (5th Cir. 1998); *see also Beiser v. Weyler*, 284 F.3d 665, 673 (5th Cir. 2002) ("If a litigant, as a matter of law, has no right to appellate review, then he has not had a full and fair opportunity to litigate and the issue is not precluded.") (citing *Restatement (Second) of Judgments* § 28); *cf. Health Cost Controls*, 187 F.3d at 708 (citing *Winters* for the proposition that "[a]n *unappealable* ruling ... is not *res judicata*") (emphasis in original). It is telling that petitioners are unable to find any appellate decision in the past quarter-century that applies *Johnson Steel* in this

context.[2] To say the least, petitioners strain credulity by asserting that this issue "is of great practical importance to the proper functioning of the federal judiciary," Pet. 14; this is an issue of very narrow applicability on which, in light of *Standefer*, there is no circuit conflict.[3]

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[2] In support of the *Johnson Steel* rule, the only appellate decisions besides *Napper* that petitioners cite are *Winters v. Lavine*, 574 F.2d 46 (2d Cir. 1978), and *Ex parte Lennon*, 64 F. 320 (6th Cir. 1894), *aff'd on other grounds*, 166 U.S. 548 (1897). *See* Pet. 13-14. Again, petitioners' reliance on those decisions is misplaced. Both decisions, like *Napper*, predate *Standefer* and are expressly based on *Johnson Steel*. *See Winters*, 574 F.2d at 62 (citing *Johnson Steel*); *Lennon*, 64 F. at 322 (citing *Johnson Steel*). And there is no question that, whatever the case before *Standefer*, both the Second and Sixth Circuits now follow the general rule set forth in Section 28 of the *Restatement (Second) of Judgments*. *See, e.g., Concerned Citizens of Cohocton Valley, Inc. v. New York Dep't of Envtl. Conservation*, 127 F.3d 201, 205 (2d Cir. 1997); *Johnson v. Watkins*, 101 F.3d 792, 795 (2d Cir. 1996); *In re DES Litig.*, 7 F.3d 20, 24 (2d Cir. 1993); *Pinkney v. Keane*, 920 F.2d 1090, 1096 & n.9 (2d Cir. 1990); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986); *Century Bus. Servs., Inc. v. Bryant*, 69 Fed. Appx. 306, 312 n.4 (6th Cir. 2003) (unpublished); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1350 (6th Cir. 1993); *Thacker v. Director, OWCP*, 891 F.2d 292, 1989 WL 149943, at *2 (6th Cir. Dec. 12, 1989) (unpublished).

[3] A distinct, but related, issue involves the preclusive effect owed to legal or factual determinations made in the context of unappealable remand orders. Here too, courts have held that the unappealable nature of such orders deprives such determinations of preclusive effect. *See, e.g., Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 624 (8th Cir. 1997); *Gonzalez-Garcia v. Williamson Dickie Mfg. Co.*, 99 F.3d 490, 492 (1st Cir. 1996); *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 322 (4th Cir. 1993); *Baldridge*, 983 F.2d at 1347-50; *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 409 (5th Cir. 1991); *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539, 1540-41 (11th Cir. 1986) (*per curiam*). Several of these decisions erroneously read the Eighth Circuit's decision in *In re Life Insurance Co.*, 857 F.2d 1190, 1193 (8th Cir. 1988), as endorsing the contrary rule. The Eighth Circuit, however, has since set the record straight, acknowledging that determinations made in the context of an unappealable remand order are *not* entitled to preclusive effect, and noting that *In re Life Insurance Co.* had not involved an unappealable remand order at all. *See*

Petitioners' position lacks a basis not only in precedent, but also in principle. The basic point here is straightforward: because "[a]ppellate review plays a central role in assuring the accuracy of decisions," *Gelb*, 798 F.2d at 44, it would be fundamentally unfair to bind a litigant with a trial-court determination that could not be appealed, *see, e.g., Winters*, 149 F.3d at 395. As this Court explained in *Standefer*, "[t]he estoppel doctrine ... is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct," and "[i]n the absence of appellate review, ... such confidence is often unwarranted." 447 U.S. at 23 n.18; *see also* 18 Charles A. Wright & Arthur Miller, *Federal Practice & Procedure* § 4421, at 559 (2d ed. 2002) ("Since appellate review is an integral part of the system, there is strong reason to insist that preclusion should be denied to findings that could not be tested by the appellate procedure ordinarily available."); *Restatement (Second) of Judgments* § 28 Reporter's Note, at 284 (noting "the pervasive importance of reviewability in the application of preclusion doctrine"); *Winters*, 149 F.3d at 395 ("[T]he availability of review is of paramount importance to the issue of preclusion.").

Against this commonsense point, petitioners note that "the preclusive effect of a judgment is not negated by a conscious decision not to appeal," and suggest that there is no difference between that situation and the situation "where the right to appeal has been precluded by Congress." Pet. 12. That suggestion is baseless. As the Restatement recognizes, there is a world of difference between these two situations: there is no unfairness in giving preclusive effect to an appealable but unappealed decision, and thus issue preclusion properly applies in that context. *See Restatement (Second) of Judgments* § 28 cmt. a, at 274 ("The exception in Subsection (1) applies only when review is precluded as a matter of law. It is does not

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Vincent v. Dakota, Minnesota & E. R.R. Corp., 200 F.3d 580, 581-82 (8th Cir. 2000); *Transit Cas. Co.*, 119 F.3d at 624 n.10.

apply in cases where review is available but is not sought."); *see generally Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 98-99 & n.6 (1954).

At bottom, petitioners' real quarrel is with Congress' decision to authorize an independent federal action to compel arbitration, *see* 9 U.S.C. § 4, and thereby to override the forum selection of a party seeking to flout an arbitration agreement. Contrary to petitioners' assertion, this is not impermissible "forum shopping" by the party seeking to compel arbitration, Pet. 16-17; rather, that party is seeking to enforce its federal right to litigate in an *arbitral* forum. Section 4 of the Federal Arbitration Act simply allows the defendant, not the plaintiff, to choose the forum to decide arbitrability. Petitioners' position would sharply limit that choice, and create the anomaly that an independent action to compel arbitration in the forum of defendants' choice would be barred where, as here, the underlying state-court lawsuit was removed and remanded, but not where the underlying state-court lawsuit was never removed at all. Petitioners may believe that an independent action under Section 4 is "a waste of judicial resources," Pet. 17, but that complaint is properly directed toward Congress, not the courts. And that complaint comes with ill grace, given that any "waste of judicial resources" is entirely the result of *petitioners'* refusal to abide by their obligation to resolve disputes with AAL through the MDR Program.

Because the courts below were fully entitled to decide the jurisdictional issue in accordance with binding Seventh Circuit law, *see* Pet. App. 6 (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997)); Pet. App. 90-91 (same)—law that petitioners have conspicuously and expressly declined to challenge in their petition, *see* Pet. i, 10 n.1—there is no basis for this Court to review that decision.

II. The Seventh Circuit Correctly Held That The Arbitrator Is Entitled To Decide Questions Regarding Limitations on Remedies.

Petitioners next argue that the Seventh Circuit erred by declining to address their challenges to the contractual prohibitions on the availability of (1) punitive damages, (2) attorneys' fees, and (3) class actions in arbitration, instead sending those challenges to the arbitrator. *See* Pet. 18-25. Again, they are wrong.

Petitioners base their argument on *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), and *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). Those decisions, according to petitioners, stand for the proposition that "the question whether the parties have submitted a dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.'" Pet. 22 (quoting *Howsam*, 537 U.S. at 83; emphasis and brackets omitted). That unremarkable proposition, however, begs the question presented here: whether petitioners' challenge to contractual limitations on the availability of certain remedies and procedures in arbitration involves "a question of arbitrability" in the first place.

As the *Howsam* Court explained just last Term, the category of "questions of arbitrability" is a "narrow" one limited to circumstances "where contracting parties would likely have expected a court to have decided the gateway matter." 537 U.S. at 83. In *Howsam* itself, this Court held that the question whether a dispute has been brought to arbitration in a timely manner—a question that the party resisting arbitration in *Howsam* characterized as a "gateway" matter—is one that the parties likely expected the arbitrators to decide. *Id.* at 84-85. Similarly, this Court last Term sent disputes over the availability of punitive damages in arbitration, *PacifiCare Health Sys., Inc. v. Book*, 123 S. Ct. 1531 (2003), and the

availability of the class-action mechanism in arbitration, *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402 (2003), to the arbitrators for resolution in the first instance.

Thus, if anything, last Term's trilogy of *Howsam*, *PacifiCare*, and *Bazzle* only underscores the sharply limited nature of the judicial inquiry at the pre-arbitration stage. That approach makes sense, because the whole point of arbitration would be undermined if parties could mount extensive preemptive challenges to arbitration remedies and procedures in court. Petitioners' insistence, at a high level of generality, that their challenges involve "questions of arbitrability" is misguided. As the *Howsam* Court noted, "[l]inguistically speaking, one might call any potentially dispositive gateway question a 'question of arbitrability,'" but this Court's precedents have given that phrase "a far more limited scope." 537 U.S. at 83. "Many decisions, of which *Prima Paint* ... is the leading example, hold that defenses to performance—even those that logically defeat arbitration—belong to the arbitrator as long as there is no doubt that the parties agreed to arbitrate." *Metro E. Ctr. for Conditioning & Health v. Qwest Communications Int'l, Inc.*, 294 F.3d 924, 929 (7th Cir.) (Easterbrook, J.), *cert. denied*, 537 U.S. 1090 (2002).

Here, petitioners have no basis to suggest that the parties reasonably would have expected a court, rather than an arbitrator, to address in the first instance the merits of their challenges to contractual limitations on the availability of certain remedies and procedures in arbitration. To the extent a party is aggrieved by an arbitral decision on these issues, that party can always seek vindication through a post-arbitration challenge to enforcement of any arbitral award. *See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). Because it is clear that the dispute here is covered by the parties' arbitration agreement, there is no question of forcing a party to arbitrate in

the absence of consent. Thus, as the Seventh Circuit recognized, *see* Pet. App. 9-10, challenges to contractual limitations on the availability of certain remedies and procedures in arbitration must be presented to the arbitrators in the first instance. *See also Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821, 823-24 (8th Cir. 2003); *Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024, 1029-32 (11th Cir. 2003); *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 726 (8th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3356 (U.S. Nov. 12, 2003) (No. 03-704); *Musnick v. King Motor Co.*, 325 F.3d 1255, 1261 & n.7 (11th Cir. 2003); *Boomer v. AT&T Corp.*, 309 F.3d 404, 418 n.6 (7th Cir. 2002); *Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88, 91-92 (1st Cir. 2002); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002); *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1086 (8th Cir. 2001); *MCI Telecomms. Corp. v. Matrix Communications Corp.*, 135 F.3d 27, 33 n.12 (1st Cir. 1998); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 231-32 (3d Cir. 1997).

Petitioners appear to believe that they can circumvent the foregoing authorities by simply asserting that the challenged contractual limitations on the availability of certain remedies and procedures in arbitration render the arbitration agreement itself unconscionable. But the *label* petitioners place on their challenge cannot control the inquiry into whether they are raising a "question of arbitrability" within the meaning of *Howsam*. It makes no sense to think a dispute over a particular contractual limitation must be resolved by the arbitrator when framed as such, but must be resolved by a court when framed under the rubric of "unconscionability." As *Howsam* makes clear, the relevant question is whether the "parties would likely expect that an arbitrator would decide the gateway matter," and

the answer to that question does not turn on how the party resisting arbitration chooses to frame the issue. 537 U.S. at 84.[4]

Nor is there any merit to petitioners' allegation of a conflict between the appellate decisions noted above and the Ninth Circuit's recent decision in *Ting v. AT&T*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 124 S. Ct. 53 (2003). The alleged conflict is illusory for the simple reason that *Ting* never paused to consider the threshold question whether a court or an arbitrator should resolve a challenge to contractual limitations on the availability of certain remedies and procedures in arbitration. Rather, the Ninth Circuit simply assumed, without expressly deciding, that this role belonged to the court, and proceeded to address the issue on the merits. *See* 319 F.3d at 1148-49. Indeed, there is no indication in the decision that the party seeking to compel arbitration ever argued that resolution of these issues belonged to the arbitrator rather than the courts.

Because the Ninth Circuit in *Ting* never considered this issue, that court cannot be deemed to have ruled on it. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 n.6 (1995) ("Of course the unexplained silences of [judicial] decisions lack precedential weight."); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (issue not "raised in briefs or argument nor discussed in the opinion of the Court" cannot be taken as "a binding precedent on th[e] point"); *Webster v. Fall*,

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[4] Petitioners thus err by asserting that "[t]he Seventh Circuit *essentially* ruled that the question of whether the arbitration agreement at issue here was substantively unconscionable must 'first be presented to the arbitrator.'" Pet. 23 (quoting Pet. App. 9; emphasis added). The Seventh Circuit held nothing of the sort. To the contrary, the Seventh Circuit addressed most of petitioners' unconscionability arguments on the merits, and simply recognized that challenges to contractual limitations on the availability of certain remedies and procedures in arbitration must be resolved by the arbitrator in the first instance *regardless* of whether presented individually or in the context of an unconscionability argument. Petitioners' assertion that "the Seventh Circuit has effectively parsed the unconscionability defense out of existence," *id.*, is pure hyperbole.

266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). If petitioners are correct that the Ninth Circuit would reject the views of all the other circuits to have squarely considered the issue, then there will be ample opportunity in the future for that court to do so.[5] As of yet, it remains premature for this Court to revisit an area that it just canvassed in *Howsam*, *PacifiCare*, and *Bazzle*, and prudence dictates that this recent trilogy of decisions should now be given an opportunity to percolate in the lower courts.

III. Petitioners Forfeited Their Standing Argument Below, And That Argument Is Meritless In Any Event.

Petitioners finally argue that—even though they themselves flouted AAL's MDR Program, with its requirement of binding arbitration, by suing AAL in court—AAL lacks constitutional "standing" to compel arbitration, because arbitration is the third of three steps in the MDR Program, and the first two steps were never undertaken. *See* Pet. 25-29. According to petitioners, "AAL's sole recourse was to bring a breach of contract counterclaim in [the underlying state-court lawsuits], seeking an injunction compelling Petitioners to proceed through the steps

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[5] Petitioners also allege an intra-circuit conflict on this issue in the Third Circuit between *Great Western*, 110 F.3d at 231-32, on the one hand, and *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003), on the other. *See* Pet. 20-21 & n.3. The party seeking arbitration in *Alexander*, however, expressly conceded that the unconscionability inquiry was for the court, not the arbitrator, *see* 341 F.3d at 264 n.5, and that case did not purport to overrule *Great Western*. Indeed, rather than "making clear its disagreement with *Great Western*" over the proposition that "'a court … must still ascertain whether the parties entered a valid agreement to arbitrate,'" Pet. 21 n.3 (quoting *Alexander*, 341 F.3d at 264), the *Alexander* court actually *cited Great Western* for that proposition—a citation that petitioners conveniently omit, *see id.* In any event, this Court is not in the business of resolving intra-circuit conflicts; if there is indeed a "conflict within the Third Circuit on this issue," *id.*, then the Third Circuit should address that perceived conflict in the first instance.

of the dispute resolution process." *Id.* at 28. This argument does not pass the straight-face test.

As an initial matter, this argument is not even properly presented here, because petitioners abandoned it below. After raising the argument in the district court—which rejected it out of hand, *see* Pet. App. 32-33—petitioners failed to raise the argument in the Seventh Circuit, and accordingly that court did not address it. It is axiomatic, of course, that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (internal quotation omitted). To be sure, constitutional standing is a jurisdictional issue, which a court not only *may* but *must* address at any point in the proceedings. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). But to say that this Court might have to address a jurisdictional issue if it were to grant a given petition for certiorari is far different than to say that this Court should grant the petition specifically to address a jurisdictional issue that petitioners themselves forfeited below. By failing to raise the standing argument in the Seventh Circuit, petitioners deprived that court of an opportunity to address the argument, thereby rendering consideration by this Court inappropriate and unwarranted. Petitioners' cite-free assertion that "the Seventh Circuit[]" adopted an "unusually broad and novel view of standing" in this case, Pet. 29, is simply inexplicable.

It is no surprise that petitioners declined to advance this argument in the Seventh Circuit, because the argument is not only groundless but perverse. Petitioners base the argument on two recent cases that declined to compel arbitration where the party seeking to do so had not first complied with contractual conditions precedent to arbitration. *See* Pet. 27 (citing *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003), and *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287 (11th Cir. 2002)). But those cases are readily

distinguishable, because in both cases a party sought to compel arbitration *before* the opposing party filed a lawsuit in defiance of an arbitration agreement. Under those circumstances, the courts recognized, the party seeking to compel arbitration could not leapfrog the contractual conditions precedent to arbitration. *See HIM Portland*, 317 F.3d at 44; *Kemiron*, 290 F.3d at 1291.

Here, in contrast, petitioners themselves sued first, thereby evincing a total rejection of the three-step MDR Program. Under these circumstances, petitioners cannot turn around and block AAL from seeking to compel binding arbitration—the third step in the program—on the ground that the parties did not first exhaust the two non-binding initial steps of internal appeal and mediation. By proceeding straight to court, petitioners necessarily rejected these two preliminary non-binding steps, and are estopped from claiming that *AAL* failed to satisfy the conditions precedent to arbitration.

The relevant precedent here is thus neither *HIM Portland* nor *Kemiron*, but instead *Southwestern Elec. Power Co. v. Local Union No. 738, Int'l B'hood of Elec. Workers,* 293 F.2d 929, 932 (5th Cir. 1961), where, as here, the party seeking arbitration "had justification for a belief that the performance of the conditions precedent [to arbitration] would be useless," because "[t]he repudiation of arbitration as a means of determining the dispute was unequivocal." Under these circumstances, the party resisting arbitration "is estopped to assert now that arbitration cannot be had because the specified conditions precedent had not been performed." *Id.* Petitioners cannot seriously expect the law to reward them for flouting the entire MDR Program by preventing AAL from seeking to compel binding arbitration. As the district court noted, it would be "incongruous"—to say the least—"for this court to decline to enter 'an order directing parties to proceed to arbitration *in accordance with the terms of the agreement*,' because the opposing party refused to comply with the agreement in the first place." Pet. App. 33 (quoting 9 U.S.C. § 4; emphasis added by court). By being forced to

litigate in court in derogation of the MDR Program, AAL's injury is immediate and concrete, not "hypothetical," "speculative," or "conjectural." Pet. 29.

In any event, this argument is manifestly case-specific and factbound, and presents no issue of broader applicability. Accordingly, this Court should deny review on this issue too.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of *certiorari*.

Respectfully submitted,

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